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BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
Advanced Television Systems )  
and Their Impact upon the )  
Existing Television Broadcast )  
Service )

MM Docket No. 87-268

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TO: The Commission

**COMMENTS OF  
W. RUSSELL WITHERS, JR.**

W. Russell Withers, Jr., licensee of Television Broadcast Station KREX-TV, Channel 5, Grand Junction, Colorado and its satellite television stations KREY-TV, Channel 10, Montrose, Colorado and KREG-TV, Channel 3, Glenwood Springs, Colorado, hereby respectfully submits his Comments in the above-entitled proceeding.

1. 5 U.S.C. §706(2)(A) forbids the Commission from taking an administrative action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". The Commission's Digital Television Service (DTV) allocation plan for the Grand Junction, Colorado television market is arbitrary, capricious, an abuse of discretion and constitutes a violation of Section

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316 of the Communications Act of 1934, as amended, in that it would (1) favor competing station KJCT-TV over KREX-TV without any explanation, rhyme or reason, and (2) reduce the normally-protected service areas of KREX-TV and KREG-TV without affording Withers procedural safeguards specifically stated in Section 316.

**Grand Junction, Colorado**

2. At Grand Junction, there are two licensed and operating television facilities: KREX-TV on Channel 5, licensed to Withers (an affiliate of the CBS and NBC networks); and KJCT-TV on Channel 8, licensed to Pikes Peak Broadcasting Co. (an affiliate of the ABC network). With no explanation, the DTV allocation table moves KREX-TV from Channel 5 to Channel 48, while preserving KJCT-TV in the VHF band with a slight channel shift from Channel 8 to Channel 7.

3. The Commission has determined in the DTV allocation table that KREX-TV currently serves 92,000 persons in an area of 6,731 square kilometers, and that KJCT-TV currently serves 115,000 persons in an area of 26,318 square kilometers. Under the proposed DTV scheme, the Commission proposes to **reduce** KREX-TV's coverage area to 5,271 square kilometers, or 78.3 percent of that which is

presently covered, and reducing population served to 91,000 persons.

4. By contrast, the Commission would expand KJCT-TV's coverage area by 21.79%, from 26,318 square kilometers to 32,053 square kilometers, thereby increasing the numbers of persons served by KJCT-TV from 115,000 to 144,000.

5. It is arbitrary and capricious for the Commission to treat two similarly situated parties in a disparate manner. *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D. C. Cir. 1965). KREX-TV should be given the same opportunity as KJCT-TV to serve a similar number of persons in a similar geographic area. Given the large distances between Grand Junction and the nearest metropolitan areas (197 airline miles west of Denver; 211 airline miles east of Salt Lake City<sup>1</sup>), the Commission could have readily formulated an allocation plan for Grand Junction, Colorado which would treat KREX-TV and KJCT-TV equitably. The Commission's failure to do so is arbitrary and capricious and an abuse of its discretion, and violates 5 U.S.C. §706(2)(A).

6. Furthermore, the Commission violates Section 316 of the Communications Act of 1934, as amended, by proposing

to reduce KREX-TV's normally protected service area without affording Withers a hearing. Section 316(a)(1) states:

(a)(1) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this chapter or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification; except that, where safety of life or property is involved, the Commission may by order provide, for a shorter period of notice.

7. To date, although obviously the 6<sup>th</sup> **NPRM** in this case giving notice of the proposed changes at Grand Junction was publicly released, Withers was not given specific personal notice of the proposed reduction in the normally protected contour for KREX-TV, and has not been given notice of the "grounds and reasons therefor". Thus, the Commission's proposal for Grand Junction violates the procedural requirements of Section 316, requirements which the Commission is obligated to follow. **The Way of Life Television Network, Inc. v. FCC**, 593 F.2d 1356 (D. C. Cir.

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<sup>1</sup>Source: **Air-Line Distances Between Cities in the United States**, U. S. Department of Commerce, Coast and Geodetic Survey, Special

1979) (holding that a Commission action was illegal where the Commission failed to abide by its own procedural rules).

8. For the foregoing reasons, Withers urges the Commission to rethink its allocation plan for Grand Junction, Colorado, and to reallocate channels at Grand Junction which allow for KREX-TV and KJCT-TV to have technically similar facilities which can (1) provide service to at least 100% of areas and populations served at present and (2) provide service to similar numbers of persons and square kilometers.

**Glenwood Springs**

9. Just as in the case of KREX-TV, the Commission proposes a reduction in the normally protected contour of KREG-TV, Channel 3, Glenwood Springs, Colorado from 31,999 square kilometers and 87,000 viewers to 25,413 square kilometers and 67,000 viewers. KREG-TV's area served would be reduced to 77.9% of that served at present. KREG-TV would be reassigned to Channel 45. Again, there is no reason assigned by the Commission for its action.

10. Once again, the Commission has violated Section 316(a)(1) of the Act by failing to give Withers any explanation for this action. Withers urges the Commission

to provide an allocation at Glenwood Springs which will enable KREG-TV to serve at least the same area and at least the same number of viewers as at present.

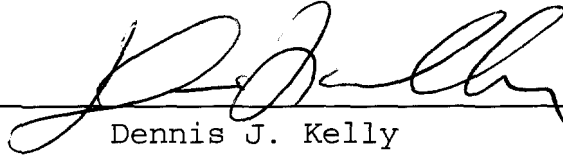
**Conclusion**

11. For its failure to treat similarly situated parties (KREX-TV and KJCT-TV) in a similar manner, the Commission's DTV allocation plan for Grand Junction, Colorado violates Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. §706(2)(A). For its proposal to reduce the normally protected service areas of KREX-TV and KREG-TV without a specific notice to Withers of the reasons justifying such reductions, the Commission's DTV allocation plan for KREX-TV and KREG-TV violates Section 316(a)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §316(a)(1). W. Russell Withers, Jr. urges the Commission to adopt a new plan for the western slope of Colorado which cures these apparent violations of federal law.

Respectfully submitted,

**W. RUSSELL WITHERS, JR.**

By

A handwritten signature in cursive script, appearing to read "D. Kelly", written over a horizontal line.

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